92-668

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs

ERWIN & ERWIN, Professional Corporation,

Defendant-appellant.

RE: PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS

FOR THE NINTH CIRCUIT

Warde H. Erwin
Counsel of Record for Defendant-appellant

Address: 2110 SW Jefferson Street
Suite 100
Portland, Oregon 97201
Phone (503 226 4525

Charles C. Erwin
Additional Counsel
Suite 100
Address: 2110 SW Jefferson Street
Portland, Oregon 97201
Phone (503) 226 4525

QUESTIONS TO BE PRESENTED

1. Did the appellate court so far deviate from the usual and customary procedues in imposing harsh sanctions, so as to invoke the supervisory powers of the Supreme Court, in the following circumstances:

Where the appellate court reviews a bankruptcy trial court decision and reverses that decision, may the appellate court impose a sanction in excess of $5000 under Fed.R.App.P. 38 upon the party who prevailed before the bankruptcy trial court, absent any other act committed by the party seeking to sustain the bankruptcy court judgment?

2. If a party to an appeal files with the appellate court a motion in arrest of the appellate court judgment, and petition to be relieved from the appellate court judgment and argues in

that motion that the appellate court judgment was flawed because the appellate court lacked significant portions of the trial court record, may the appellate court impose a sanction of $2,500 under Fed. R. App. P.38 absent any other act upon the part of the party sanctioned?

3. Is the appellate court required under Amendment V of the CONSTITUTION OF THE UNITED STATES to give notice of intent to impose sanctions and to afford the person it sanctioned an opportunity to be heard upon the issue?

NAMES OF PARTIES TO THE PROCEEDING

The names of all parties to the original proceeding are contained in the caption of the case.

Erwin & Erwin, Professional Corporation, is a professional legal corporation licensed to practice in the State of Oregon. The two officers of the corporation and the two members of the Bar are Warde H. Erwin and Charles C. Erwin who are the duly licensed lawyers practicing law before all Oregon courts, both Federal, District, and Ninth Circuit. Warde H. Erwin has been admitted to the Supreme Court of the United States.

In view of the nature of the proceedings of the Court of Appeals, the plaintiff-appellee or her attorney may not be interested in this petition.

The Solicitor General may well be an interested party since the sanctions imposed are against officers of the

Federal Court Bars which involves application of Fed. R. Civ. P. and Fed. R. App. P., and the decision has substantial impact upon all members of the Bars of Federal Courts and is of great public interest in the maintenance of the integrity of the Federal Judicial system. U. S.C. 2403 (a) may be applicable, and the Solicitor General, Department of Justice, Washington, D.C. 2053 is being served.

The Ninth Circuit has not certified the constitutionality of Fed. R. App. P. 38, 11 U.S.C. 502, nor Rule Br. 8013. Only Fed. R. App. P. 38 is questioned as to constitutionality.

TABLE OF CONTENTS AND AUTHORITIES

		Page
1.	Questions Presented	1
2.	Names of Parties	3
3.	References to Opinions and Orders	10
4.	Jurisdiction	12
5.	Citations to Constitution, Statutes, and Rules Verbatim, and Appendix	13
6.	Statement of the Case	14
7.	Argument	25
	a. Validity of Orders	25
	b. The Order of March 24, 1992	26
	c. The Order of July 22, 1992, and August 10, 1992	28
	d. Was the Appeal Frivolous	33

	Page
e. Discussion of Order of March 24, 1992, as to Frivolousness	34
f. Professional Corporations	34
g. 11 U.S.C. 502 (B) (4)	45
h. The Added $2500 Sanction	52
i. The "En Banc" Failure	54
j. The Constitutional Question	62
k. First Impression	66
l. Conclusion	67

AUTHORITIES

CASES AND OTHER:

CASES:

	Page
Bulgo v. Munoz, 853 F. 2d 710 (9th Cir. 1988)	60
Caldwell v. Puget Sound Electrical Apprenticeship & Training Trust, 824 F.2d 765, 44 BNA FEP CAS, 43 C.C.H. EPD 37295 (9th Cir. 1987)	59
Hanna Boys Center v. Miller, 853 F.2d 682, 129 BNA LRRM 2082 109 C.C. H. LCP 10647 (9th Cir. 1988)	60
Kehr v. Smith Barney, Harris, Upham & Co., 736 F.2d 1283, C.C.H. Fed. Sec. L. Rep. 91547 (CA 9 Cal 1984)	59
Leidholdt v. L.F.P., Inc. 860 F.2d 890, 10-9 S. Ct. 1532, 15 MEDIA L. R. 2201, cert. den. (U.S.) 103 L. Ed. 2d 837, 109 S. Ct. 1532 (9th Cir. 1988)	60

Page

Mackey v. Pioneer National Bank,
867 F. 2d 520, 13 F.R. Serv. 3d 638
(9th Cir. 1989) 60

McConnell v. Critchlow, 661 F.2d
116 (9th Cir. 1981) 66

RRX Industries v. Lab-Con-Inc.,
772 F.2d 545, 41 U.C.C.R.S. 1561
(9th Cir. 1985) 59

Sheet Metal Workers Int'l Assn.
Local No. 162 v Jason Mfg. Inc.,
900 F.2d 1392, 134 BNA LRRM 2097, 115
C.C.H., LCP 10003 (9th Cir. 1990) 60

Tomer v. Gates, 811 F.2d 1240
(9th Cir. 1987) 60

Unt v. Aerospace Corp., 765 F.
2d 1440, 38 BNA Fed. Cas. 999, 37
C.C.H. EPD 35427, 2 FR Serv. 3d 524
(9th Cir. 1985) 59

FEDERAL RULES OF CIVIL PROCEDURE 10, 12,
23,29, 52,54,55,61,70 (Verbatim Appendix
p. 273)

	Page
FEDERAL RULES OF APPELLATE PROCEDURE	28,30,31,33, 36,62,63,65, 68
Federal Rules of Appellate Procedure Rule 38 (Verbatim Appendix p. 269)	
Advisory Notes Rule 35 (Verbatim Appendix p. 271)	55, 61
Bankruptcy 8013 (Verbatim Appendix p. 269)	39, 43, 70
FEDERAL STATUTES:	
11 U.S.C. 502 (Verbatim Appendix p. 270)	43, 46, 70
OREGON STATUTES:	
ORS 58.075 (Verbatim Appendix p. 268)	26
ORS 58.155 (Vserbatim Appendix p. 269)	26
UNITED STATES CONSTITUTION AMENDMENT V (Verbatim Appendix p. 268)	32, 62, 65, 67
67 A.L.R. Fed (Later Case Service)	60

REFERENCE TO REPORTS OF OPINIONS AND ORDERS

Page

1. Opinion of Bankruptcy Court (not published) May 6,, 1985 15
2. Opinion of United States District Court for the District of Oregon, 1991 (not published) 42
3. Opinion of the Court of Appeals dated August 26, 1991, 942 F.2d 1462 (9th Cir. 1991) 20,22,28, 29,35, 36,37,38, 54, 55, 69
4. Order of March 24, 1992, imposing sanction for an alleged frivolous appeal 959 F.2d 800 (9th Cir. 1992) 21,26,28,34,35,,37,47,52,53, 67,68
5. Order dated July 22, 1992, of the Ninth Circuit Court of Appeals panel denying petition for Rule Fed. R. Civ. P. 60, for relief from opinion of August

Page

August 26, 1991, and levying an additional sanction) (not published) 23,29,30, 52

6. Order of July 28, 1992, vacating July 22, 1992 Order as to additional sanction (not published 23,52

7. Order of August 10, 1992, modifying Order of July 22, 1992, (not published) 24, 29,53,55,64

8. Order dated August 13, 1992, denying rehearing of the Order of March 24, 1992, and denying hearing en banc (not pubished) 25,57 58,63,68

JURISDICTION

Dates of entry of judgment for which review is sought by this petition:

1. Order of Ninth Circuit Court of Appeals dated March 24, 1992, levying sanction damages of $5058.75.

2. Order of Ninth Circuit Court panel, dated July 22, 1992, as modified by order dated July 28, 1992, and further modified by order dated August 10, 1992, and failing to submit "en banc" suggestion to the full court and denying hearing of Fed. R. Civ. P. 60 petition for relief from judgment of August 26, 1992.

3. Order of Ninth Circuit Court panel, dated August 13, 1992, denying rehearing of order dated March 24, 1992, and "en banc" suggestion.

CITATIONS TO CONSTITUTION, STATUTES, AND RULES

1. Amendment V, UNITED STATES CONSTITUTION (Appendix p. 268)
2. OREGON REVISED STATUTES, Professional Corporation) (Appendix p. 268-9)
3. FEDERAL RULES OF CIVIL PROCEDURE 68 (Appendix p. 273)
4. FEDERAL STATUTE, 11 U.S.C 502 (Appendix p. 270)
5. FEDERAL RULES OF APPELLATE PROCEDURE 35 (Appendix p. 270)
6. FEDERAL RULES OF APPELLATE PROCEDURE 38 (Appendix p. 269)

STATEMENT OF THE CASE

Erwin & Erwin, Professional Corporation as attorneys for the bankrupt debtor, Marquam Investment Corporation, filed a claim for the reasonable value of those services in the United States bankruptcy court for the District of Oregon.

A creditor (plaintiff-appellee), holding, an unsecured punitive damage claim against the same debtor, opposed the claim on the theory that any services performed by Erwin & Erwin, P. C. in behalf of the bankrupt were intended to be a gift.

Hearings were held to determine the "intent" of then Erwin, Lamb & Erwin, Professional Corporation to furnish its legal services to the debtor as a gift. (Colin Lamb subsequently divested his interest in the corporation.) Testimony was presented, cross examination

provided, rebuttal testimony presented, and arguments held (See affidavit of Charles Robinowitz (Appendix p. 25- Appendix p. 26,) and transcript of proceedings of United States Bankruptcy Court (Judge Hess) entries dated 10-14-83 (App. p. 86) 11-18-83 (App. p. 88) Transcript file 2-23-84 (App. 90), 2-24-84 (App. p. 90), 1-28-85 (App. 95), 4-26-85 (App. p. 98), 5-2-85 (App. p. 99), 8-16-85 (App. p.106), 8-19-85 (App. p. 107),4-3-87 (App. p. 120), 5-28-87 (App. p. 121) 6-9-87 (App. p. 121).

The bankruptcy court determined that services were not intended by Erwin & Erwin, Professional Corporation to be gratuitous to the debtor (opinion of Judge Henry Hess (5-6-85, Tr. p. 194). (Appendix p.1). (Order Appendix p. 16)

The determination of the reasonable value of the services was postponed for a further hearing and determination.

Objector filed an interlocutory appeal to the District Court for the District of Oregon (Docket entry - District Court) (Appendix p. 100).

The District Court dismissed the appeal on the grounds that evidence to be introduced on "reasonable value" might have an effect on a determination of "intent to provide gratuitous services." (Appendix p. 26)

In February, 1986, the court and objector made request for a detailed claim, and the senior bankruptcy judge in April, 1986, required the document to be prepared; it was prepared and reduced to writing (65 pages) and was filed (Appellant's Brief p. 9, Appendix p. 214).

Hearings were scheduled and held May 18, 1987, May 26, 1987, June 5, 1987, June 16, 1987, consisting of over 20 hours of testimony,

exhibits, cross-examination, and rebuttal evidence (affidavit of Robinowitz in support of motion to sever appeal April 27, 1988) in behalf of appellant - objector) (Appendix p. 27).

(The Court of Appeals found that no such exhibit existed.) (Appendix p. 65)

The bankruptcy court allowed the claim as to reasonable value of the services and entered judgment. (Appendix p. 18)

Plaintiff-objector filed a notice of appeal to the District Court for the District of Oregon on April 4, 1988, (Transmittal of record-item three, dated 4-4-88) and on April 28, 1988, a motion to sever issues, and to determine on appeal only the bankruptcy court's order which determined that Erwin & Erwin, P.C. did not intend to perform the services as a gift (U.S. District Court, Item 11 - transcript of record on appeal).

(Appendix p. 186)

The motion to sever was allowed, and the record was ordered to be limited to the issue requested (District Court minutes 6-1-88) (Appendix p.157) (Appendix p. 31).

The "reasonable" value of services was not appealed.

The excerpt of record on appeal was filed by Brewer on June 22, 1989, (Dist. Ct. Transmittal of record, Item 22 and Item 35). (Appendix p. 196)

On March 8, 1990, without notice, argument, or hearing the District Court entered an Order reversing the Bankruptcy Court order allowing the claim of Erwin & Erwin (District Court docket, Item 46) (Appendix p. 164) (Appellant's brief p. 6) (Appendix p. 211) (Order Appendix p. 33) (Opinion App. p. 59).

On April 5, 1990, Erwin & Erwin, P. C. filed a Notice of Appeal from the

order of March 8, 1990, to the Ninth Circuit Court of Appeals and designated the record in the District Court. The record was transmitted on April 24, 1990, as the record on appeal, and filed on April 24, 1990. (Transmittal of Record 192) (Appendix p. 198).

On September 17, 1990, Brewer filed supplemental excerpts of record and moved to file oversized excerpts permitting consideration by the appellate court of matters outside of the record. Brewer requested that the Ninth Circuit take judicial notice of the extra judicial statements (Ninth Circuit Docket Sheet 10-5-90 and 10-15-90) (Appendix p. 176-177).

The motion of Brewer to consider matters outside of the record was denied on August 26, 1991. (Appendix p. 60)

The motion to file oversized excerpts was denied on September 28, 1990 (Appendix p. 177).

The request to take judicial notice of matters outside the record was denied by the appellate court but also directed Brewer to file a judicial notice request to the appellate tribunal when that tribunal had been determined. (Appendix p. 177) (Docket entry 10-5-90).

On October 15, 1990, Brewer filed supplemental excerpts of record on appeal and request for judicial notice per order of September 28, 1990, (Ninth Circuit Docket 10-15-90) (Appendix p. 177) of matters outside the record and not offered nor considered by the bankruptcy court.

On August 26, 1991, the Ninth Circuit panel affirmed the District Court's reversal of the bankruptcy court on a "de novo" theory that concedes that the

District Court may have been in error in considering matters outside of the record but held it was not important since it was ignoring the District Court's decision in its entirety. (945 F.2d 1462) (9th Cir.1991) (Appendix p. 44-59).

Appellee (objector and appellant below, Brewer) filed a motion to allow attorney's fees on September 23, 1991. (Ninth Circuit). (Appendix p. 184) Erwin & Erwin opposed the motion on 10-3-91 (Ninth Cir. Docket 10-3-91).

On December 13, 1991, the Ninth Circuit court's mandate was issued with costs to appellee. It allowed only single costs. This should have determined entitlement to sanctions.

On March 24, 1992, the Ninth Circuit issued an Order levying a $5058.75 damage sanction against Erwin & Erwin, P.C. for filing a frivolous appeal from the District Court's reversal of the

bankruptcy court's order which allowed the claim for prepetition services provided to the bankrupt (Appendix p. 61). (Appendix p. 184)

The presiding judge of the Ninth Circuit panel filed a dissenting opinion (Ninth Circuit Docket 3-24-92). (Appendix 66).

On April 7, 1992, Erwin & Erwin, P. C. filed a petition for rehearing with suggestion for "en banc" determination. (Appendix p.185) (Docket 9th Cir. 4-7-92)

. On April 9, 1992, Erwin & Erwin, P.C. moved to file excerpts to accompany the motion for rehearing and "en banc" suggestion. (9th Cir. Docket 4-9-92) On April 29, 1992, Erwin & Erwin, P. C. filed a Fed. R. Civ. P. 60 petition for relief from the judgment dated 8-26-91, with suggestion for "en banc" hearing. (Appendix 185) (9th Cir. Docket 4-29-

92). This motion was distributed to the panel - no distribution was made to the "en banc" court as indicated by the Ninth Circuit docket per the docket entries.

Additional authorities in support of the petition for Fed. R. Civ. P. 60 relief were shelved and not distributed to the members of the court pending the determination of a motion to recall the mandate (Appendix p.185 (Ninth Circuit Docket 4/29/92). It also was NEVER distributed to the en banc court.

The motion to permit filing an excerpt to accompany the motion for rehearing of the sanction order of March 24, 1992, was granted on July 22, 1992. (Appendix p. 74)

On July 22, 1992, the Ninth Circuit panel entered an order denying the petition for Fed. R.Civ.P. 60 relief and levying an "additional" $2500 sanction payable to the clerk (Appendix p. 72).

No action on the "en banc" suggestion was taken.

On July 28, 1992, the order of July 22, 1992, was mysteriously ordered vacated as to the sanction. (Appendix p. 74)

On August 5, 1992, the excerpts in support of rehearing were filed and distributed (Ninth Circuit Docket 8-5-92). (Appendix p.187) (The excerpt consisted of a copy of the Court of Appeals opinion of August 26, 1991, denying the claim for services, a copy of the District Court order severing the appeal and limiting the record, and a copy of the Order of the Ninth Circuit Court of March 24, 1992, levying the sanction.

On August 10, 1992, a new sanction order duplicating the July 22, 1992, order was entered. This deleted accrual of interest on the $2500 sanction and

deleted the place or person to whom the added sanction was to be paid. (Appendix p. 76)

On August 13, 1992, the Ninth Circuit entered an order denying the petition for rehearing of the March 24, 1992, order and recommending against "en banc" hearing and denying the request. The order further recited that the full court has been advised of the recommendation and that no judge had requested a rehearing en banc. (Appendix p. 78).

ARGUMENT

VALIDITY OF ORDERS IMPOSING SANCTIONS

There are two orders for which review is sought, the determination of which may terminate or have a tendency to terminate the request for examination of procedures of the Ninth Circuit Court of Appeals.

THE ORDER OF MARCH 24, 1992

This order levied a devastating award of $5058.75 judgment against Erwin & Erwin, P. C. as a claimant in the bankruptcy of Marquam Investment Corporation. Since the claim was for legal services rendered to a bankrupt, and since a professional legal corporation may provide services only by lawyers, licensed under Oregon law, the sanction was automatically imposed upon Warde H. Erwin and Charles C. Erwin, who are both officers of the Federal Courts. (ORS 58.075; ORS 58.155) (Appendix p. 268-269)

The levy was stated to have been made under authority of Fed. R. App. P. 38 based upon the appeal from the District Court of the District of Oregon which reversed an order of the United States Bankruptcy Court for the District

of Oregon which had allowed the claim of Erwin & Erwin, P. C.

Two of the three Court of Appeals judges stated that the appeal was frivolous.

If the Court of Appeals had no authority to levy the sanction, it might not be necessary to proceed to determine whether or not the appeal was frivolous, although the court might wish to examine the procedure adopted by the U. S. District Court as approved by and as unilaterally, initiated by the Court of Appeals in reversing the Order of the bankruptcy court.

Erwin & Erwin, P.C. was the "appellee" in the District Court (for purposes of Rule 38) and not the "appellant."

The Court of Appeals correctly realligned the parties when it determined to decide the case "de novo" on the

bankruptcy court record (see order of August 26, 1991, p. 11805) (Appendix p. 50),

The reallignment was again repeated verbatim in the dissent of Judge Alarcon to the order of March 24, 1992 (p. 2860 as analyzed p. 2859) which levied the devastating sanction. (Appendix p. 70)

Rule Fed. R. App. P. 38 authorizes sanctions only against appellants taking frivolous appeals. (Appendix p. 269)

Erwin & Erwin, P. C. was not an appellant for the purpose of Fed. R. App. P. 38, and the sanction levied by the order of March 24, 1992, was improper and probably void (both constitutionally and legislatively).

The order of March 24, 1992, should be reversed.

THE ORDER OF JULY 22, 1992 AS MODIFIED BY ORDER OF JULY 28, 1992 AND FURTHER MODIFIED BY ORDER OF AUGUST 10, 1992

Two of these orders levied an "additional" $2500 sanction against Erwin & Erwin, P. C. (July 22, 1992, and August 10, 1992). (Appendix p. 72476)

The order of July 28, 1992, vacated the sanction of $2500 in its entirety as levied by the July 22, 1992 order. (Appendix p. 74)

On August 10, 1992, the Ninth Circuit issued the new order without any reference to any previous order. (Appendix p. 76)

The August 10, 1992 order repeated the denial of Erwin & Erwin, P. C.'s motion for Fed. R. Civ. P. 60 relief from the judgment of August 26, 1991, and repeated the $2500 sanction. (Appendix p. 276)

However, it eliminated the interest factor contained in the July 22, 1992 order and removed the requirements of payment to the clerk leaving the August

10, 1992, order silent as to whom it was to be paid.

Neither the July 22, 1992, nor the August 10, 1992, order ascribed any reason for the sanction except that it was levied under Fed. R. App. P. 38.

Since it was not a damage award to Brewer, she not having participated in nor appeared as to the motion for Fed. R. Civ. P. 60 relief, we can only assume that the sanction was assessed because Erwin & Erwin, P. C. had the temerity to seek relief from what now appears to have been a void judgment entered by the Court of Appeals on August 26, 1991, said judgment being based upon a record which it did not have before it and which it did not examine.

Fed. R. App. P. 38 does not authorize any such sanction for requesting Rule 60 relief from an improper and probably void judgment (see petition for

Rule 60 relief separate submittal "B") Fed. R. App. P. 38 applies only to appeals and not to motions for relief.

The elimination of that portion of the July 22, 1992, order which directed that payment be made to the Clerk of the court is puzzling. Particularly this is true because it labels the sanction to be a "further" sanction but does not award damages (of which, of course, there could be none). "Damages" or "single or double costs" to an appellee are the only type of sanctions authorized by Fed. R. App. P. 38.

Both sanctions here are without authority and should be reversed. They were improper legally, as well as procedurally.

If either were allowed to stand, the constitutionally prevented taking of property without due or ANY hearing or procedure or process of law would be

brought into play under Amendment V of the United States Constitution. The disastrous consequence of allowing the Ninth Circuit to sanction the mere resisting of an appeal of a favorable factual determination, involving the duties of officers of the court, would have an explosive impact on the entire Federal Judicial system and Bar, as Judge Alarcon wrote in his dissent to the March 24, 1992, order (p. 2860) (Appendix p. 66).

If this court does not grant certiorari, counsel are placed in the dilemna of facing sanctions or committing malpractice.

Judicial immunity does not authorize the unauthorized taking of property without process of law by anyone including judicial officers or the Congress of the United States.

If Fed. R. App. P. 38 were construed to authorize such unlimited action for an undefined "sin," it would clearly be unconstitutional and void.

WAS THE APPEAL FROM THE DISTRICT COURT FRIVOLOUS?

Not knowing whether or not this court will grant this writ on the above-cited grounds, it is necessary or at least advisable to discuss the procedure adopted by the Court of Appeals to determine its finding (without any hearing) that the appeal from the District Court's reversal of the bankruptcy court's order allowing Erwin & Erwin's claim for services was frivolous so as to invite the sanction levied by the Order of March 24, 1992.

It will also be necessary to determine the procedure adopted by the Court of Appeals in levying a "further" sanction, apparently for filing a motion

for relief from the original judgment of the Court of Appeals which independently (and also without hearing) determined to reverse by a de novo trial the bankruptcy court by a de novo order which allowed the claim of Erwin & Erwin, P.C. against the bankrupt debtor (Opinion of August 26, 1992, 942 F.2d 1462, (9th Cir. 1991) Slip Opinion, pgs. 11799-11809). (Appendix p. 38).

DISCUSSION OF THE ORDER OF MARCH 24, 1992, AS TO FRIVOLOUSNESS:

By Oregon law, a professional corporation must operate only by and through its shareholders who are themselves licensed to render such services. (Appendix p. 268-269)

The effect of the sanction therefore should be examined as to its effect on the judicial system when its officers are sanctioned without cause and for exercising only the duties entrusted to

them, as such, and as authorized by the laws of the United States of America in the administration of the Federal Judicial system. (Appendix p. 69-71)

The reason given for the sanction of March 24, 1992, ($5058.75) was that Erwin & Erwin, P. C. appealed an adverse judgment of the District Court of the State of Oregon. The Ninth Circuit labelled that appeal as "frivolous" in a special order seven months after its opinion of August 26, 1991.

The peculiarity of that Order and the lack of precedent for such an action is a false application of Fed. R. App. P. 38.

There is only one reason given for the Ninth Circuit's action of March 24, 1992. (Order Appendix p. 66)

The Ninth Circuit panel reasoned that Erwin & Erwin, P.C. should have known and realized that the favorable

decision of the bankruptcy judge allowing Erwin & Erwin, P. C.'s claim for services provided to a bankrupt (Marquam Investment Corporation) would later (17 months later) (3-8-90 - Appendix p. 164 to August 26, 1991 - Appendix p. 35) be characterized by the Court of Appeals as flawed by lack of reason, adopted a flawed syllogism. It imputes the foresight to the party successful at trial on a factual "intent" question that the senior bankruptcy judge was so devoid of knowledge and application of the simplest of principles of contract law that Erwin & Erwin, P. C. should have realized that the decision of the bankruptcy court would be reversed by the District Court, that an appeal of the District Court's reversal would thereafter be deemed to be frivolous, and would result in punishment under Fed. R. App. P. 38 by a damage award levied as

punishment by the appellate Ninth Circuit. Yet, the Ninth Circuit found the District Court erred in considering a multitude of items outside of the record. Strangely, the entire appeal from the District Court (which the Court of Appeals held was frivolous by its order of March 24, 1992) had been disregarded and discarded by the appellate court in its opinion of August 26, 1991. The Court of Appeals entered what was characterized as a "de novo" opinion, not authorized, briefed, or argued by anyone.

The authority under which the sanction was levied states: (Appendix p. 269)

No suggestion was made that Erwin & Erwin, P. C. did anything or intended to do anything to delay, defraud, hinder, or obstruct judicial procedure by appealing the District Court's reversal of the

bankruptcy court's decision allowing its claim.

We are including in the Appendix (p. 199) a copy of the brief of Erwin & Erwin, P. C. in support of the appeal in order that this court may determine whether or not the appeal was "frivolous" or for some purpose other than a bona fide claim of error with which the Court of Appeals agreed, arguendo (p. 11808 Opinion of August 26, 1991). (Appendix p.59)

As far as the Ninth Circuit was concerned, whether or not the appeal had substance was of no consequence since it determined that it would ignore the appeal and the District Court's decision from which the appeal was taken completely and in its entirety and as though it did not exist.

The sanction, so far as we can tell, was not levied based upon an examination

of the "validity" or substance of the appeal because that entire proceeding had completely been discarded by the Ninth Circuit panel.

It is therefore ascertainable that when it made its decision for sanctions, it did so on some other basis.

But what was that basis?

The basis was (ignoring the mandate of Br. 8013, that factual determinations are not to be disturbed on appeal) that the senior judge of the bankruptcy court for the District of Oregon although enjoying a reputation for integrity, perspecuity, ability, years of experience, and the confidence of the members of the Federal Bar was, in the opinion of the three judges of the Ninth Circuit completely lacking in logic, knowledge of the basic principles of contract law, and guilty of flawed reasoning to the point that his decision

was so lacking in merit that the claimant should have known that his decision would be reversed and therefore should not have appealed.

One would have thought that it would have occurred to the panel that something was wrong when a judge of the stature of Judge Hess would enter a judgment allowing a claim without any basis in logic, without reason, and without supporting evidence and without knowledge of contract law.

However, the error was not that of Judge Hess, was not that of Erwin & Erwin, P. C., but was the product of an erroneous decision of the U. S. District Court for the District of Oregon, in relying upon and sua sponte embellishing the record of the bankruptcy court by accepting unsupported statements of counsel, relying on information, the source of which to this day becomes

undiscoverable, and much of which the bankruptcy court had not ever considered, nor seen, was not offered, nor received and was not designated as the record on appeal by Brewer on her appeal from the bankruptcy court to the District Court as required by appellate procedure.

All of this was done without notice or hearing of any sort or kind.

The error was compounded by the Ninth Circuit panel abandoning the limited scope of the issue presented to and ordered by the District Court; namely, "intent of the attorneys for a bankrupt debtor to provide gratuitous services to a bankrupt corporation," and in considering the entire claim, (not just the single issue presented to the bankruptcy court) as though the claim was being reviewed directly, and in its entirety as a <u>trial</u> de novo.

The District Court in its opinion frankly admitted that it was considering matters outside of the record of the bankruptcy court.

It stated:

> "The bankruptcy court's rulings are certainly understandable because of the protracted hearings on this claim."

But then the District Court admitted its improper conduct in considering statements from counsel's brief as evidence and went on to state: (Appendix 228 et seq.) (Appellant's Brief)

> "Although the bankruptcy court held evidentiary hearings in 1985, it did not have the opportunity TO CONSIDER LATER DEVELOPMENTS."

(Emphasis ours)

Consideration of "so called later developments" not considered by the trial court is absolutely prohibited to an

appellate court sitting in review of a trial court's decision (See Bankruptcy Rule 8013).

The bankruptcy court had followed the mandate of the claims statutes, 11 U.S.C. 502, and correctly applied the law. It should not have been faulted or ridiculed for so doing.

Erwin & Erwin, P.C. had no choice but to appeal to the Ninth Circuit as a complete deviation from the usual and customary procedures, but also directly contrary to the authority of a reviewing court as limited by BR. 8013.

The Ninth Circuit panel examined the case, based upon what it said was a complete bankruptcy court record. It was not. It determined that the record which it had before it, and which it examined, was so limited and unpersuasive that the panel could not understand how the bankruptcy judge could have allowed the

claim. (But, in its order of August 26, 1991, it was the bankruptcy judge that it vilified and not Erwin & Erwin, P. C.).

The Ninth Circuit panel did several things:

It determined that the claim of Erwin, Lamb & Erwin, P.C. was based upon a contract negotiated between Erwin, Lamb & Erwin, P. C. and an officer of the bankrupt acting in behalf of the Marquam Investment Corporation as the debtor to provide the legal services for which a claim was made.

The contract theory was spawned in the mind of the Court of Appeals.

This was a completely erroneous assumption. It was not contended by anyone, not briefed and not argued by anyone, nor was contract law even an element of the claim.

Why it was discussed in the so called "de novo" review articulated by

the August 26, 1991, decision is not ascertainable.

The right to recover for services performed by an "insider" (bankruptcy term), or by an "attorney for the debtor" is required by law (if contested) to be allowed by the bankruptcy court, but only to the extent of the "reasonable value" (not contract value) of the services actually performed in behalf of the bankrupt.

The concept of quasi contract or quantum meruit recovery is so fundamental and familiar in bankruptcy matters that it is codified in 11 U.S.C. 502 (b) (4). (Appendix p. 270). This statute, in the case of services of "insiders" and "attorneys for a debtor" requires the bankruptcy judge to ignore any contractual basis in his examination of such claims. The statute mandates that the court is to examine claims for

services and disallow that portion which exceeds the reasonable value of such services. No other case finding disallowance as a gift, including actual out-of-pocket dollars advanced for a client/debtor has been located.

It is fundamental law that when a person peforms services at the request of another, the law will presume an intent to pay for those services to the extent of the reasonable value thereof.

No contention was made by Brewer, within the scope of the record reviewed here, save the charge of donative intent upon the part of the appellant. She did not charge that the claim was not based upon services actually performed nor the reasonable value was excessive or was not enforceable against the debtor, either under any other "applicable law, or because of an agreement." (11 U.S.C. 502 (b) (1))

The adoption of a rule requiring a formal written contract to support a claim for services actually rendered to a debtor bankrupt is the product of an erroneous unilateral aberration of the Ninth Circuit panel and is directly contrary to statutory law. (See appellant's Petition for rehearing of order of March 24, 1992 p. 12).
(Separate submittal "A")

The bankruptcy judge followed the statutory mandate, held hearings, required written proof of each of the services rendered, dates, and values, and ordered it served on the objector who cross-examined witnesses, and introduced what she considered to be rebuttal testimony. (District Court record on appeal) (Appendix p. 219)

The document prepared by claimant in response to the direction of the bankruptcy judge consisted of 65 pages,

including court registers, showing the multitude of delay motions filed by Brewer on what should have been a simple F.E.D. case, in support of which there was countless hours of testimony, (20 hours admitted by Brewer's attorney) (affidavit in support of motion to sever) (Appendix p. 27) also see appellant's brief, footnote one, page 12) (Appendix p. 217). The F.E.D. case ended favorably for Marquam after a full trial.

Although the Ninth Circuit panel decision (August 26, 1991) was erroneous in that because while it stated that it was examining the bankruptcy court's decision allowing the claim of Erwin & Erwin, P.C. based upon the bankruptcy court records, that statement was false. It did not have the bankruptcy court record before it to examine "de novo" although it may have thought the bankruptcy court record was

before it. It had only that portion of the bankruptcy court record forwarded to it by the District Court from which the majority had been excised by order of the District Court.

While the appellate panel recognized that the District Court had accepted as fact matters which were not in the record and stated that it was not important since they were ignoring the District Court's opinion, they nevertheless repeated the District Court error by themselves, reciting as fact and history, extra judicial statements which could have only come from the request to take judicial notice of matters outside of the record (see record for rehearing p.132, Appendix p. 229, et seq).

An example:

The panel noted that there was no written evidence of services performed. In the bankruptcy records reposed a 65-

page detailed exhibit supported by court records of each of the services performed. (Appendix p. 48)

But it was seven months after its August 27, 1991, decision that it apparently determined (for some undisclosed reason) to examine the question of sanctions.

On March 24, 1992, the Ninth Circuit panel suddenly decided upon a sanction or punishment, but for what reason? The appeal had been totally disregarded, and it had entered on August 26, 1991, a "de novo" opinion.

It stated that it was awarding a damage sanction under Fed. R. App. P. 38 as a result of taking a frivolous appeal, but the reason given was not anything Erwin & Erwin, P. C. had done, but was based upon the fact that Erwin & Erwin, P.C. should have known of the incompetency of the bankruptcy judge when

he allowed Erwin & Erwin's claim and therefore should not have questioned the District Court's reversal no matter how erroneous.

For having the temerity to appeal Erwin & Erwin, P. C. was slapped with a thunder-striking $5058.75 judgment in favor of the party that lost the decision in the trial court.

Erwin & Erwin, P. C. claims that this procedures was so unusual and so bizarre as to call into play the supervisory powers of the Supreme Court.

The importance of this decision to the Federal judicial administration is very compelling. If the sanction is allowed to stand, no officer of the Federal Court would dare appeal a District Court decision for fear that if the appellate court reversed the trial court, the lawyer (although an officer of the court and an integral element of

Federal Legal Jurisprudence), the lawyer would be sanctioned and would therefore hesitate to vigorously assert and defend his client's rights accorded by the laws of the United States.

(See Dissent of Judge Alarcon- Order of March 24, 1992) (Appendix p. 66)

THE ADDITIONAL $2500 SANCTION

The judgment order of July 22, 1992, levying an additional sanction in the amount of $2500 was levied by an Order which denied Erwin & Erwin, P.C.'s petition for relief under Fed. R. Civ. P. 60 (copy of petition separately submitted as submittal "B" for the court's information).

There is no explanation given of the reason for the levying of the sanction. (Appendix p. 72 and p. 76).

As a matter of fact it is not known for certain whether or not it has been assessed since it was vacated by an Order

of July 28, 1992 but reassessed by the Order of August 10, 1992.

Following the imposition of the original sanction order of March 24, 1992, Erwin & Erwin, P. C. filed a motion for rehearing and a suggestion for "en banc" hearing. (Submittal "A")

Because the sanction was based upon the taking of the appeal from the District Court decision and upon the Ninth Circuit Court's affirmance of the District Court, which had in turn reversed the determination of the bankruptcy court allowing the claim of Erwin & Erwin, P. C., it was determined that not only the $5038.75 sanction levied on March 24, 1992, should be reviewed by rehearing but that in order to determine whether the appeal upon which the sanction was based was frivolous, it was necessary that the court's attention be drawn to the actions

of the Court of Appeals in entering its decision on August 26, 1991, affirming the District Court. A petition for relief from that judgment was thought to be appropriate since that judgment appeared to have been void because not entered in reliance on a complete record (mistake of the appellate court).

It was felt that there was clear error and that the purpose of Fed. R. Civ. P. 60 where a "de novo" trial for relief from judgment was based on the court's own mistake and was not only appropriate but was exactly what Rule 60 was intended to accomplish. (Rule 60 verbatim Appendix p. 273)

FAILURE TO FOLLOW EN BANC PROCEDURES

The Court of Appeals failed to follow the procedures as set forth by Fed. R. App. P. 35 and the advisory notes adopted by the Ninth Circuit as usual and customary procedure.

In this case, the Motion for Relief from the August 26, 1991, Order affirming the District Court under Fed. R. Civ. P. 60 with "en banc" suggestion were not distributed at all (see Docket entries); no recommendations were made by the panel to the court, and no 21-day time lapse was therefore allowed. (See Advisory notes as to Fed. R. App. p. 35-4 adopted by the Ninth Circuit. (Appendix p.271)

In the case of the motion for rehearing with "en banc" suggestion, the petitions were distributed to the court by the clerk (Appendix p. 185). The bankruptcy excerpts were refused by the Clerk (at date of filing), and a motion for leave to distribute the excerpts was filed promptly, but not allowed until July 22, 1992, and not filed until August 5, 1992, (Wednesday).

Monday, August 10, 1992, (the same date as the new amended order denying the

Fed. R. Civ. P. 60 relief was entered) would have reasonably been the first date a considered recommendation to the full court could have been made if the excerpts were to be considered by the full court.

The order denying rehearing and denying en banc hearing was filed August 13, 1992, and that is the only document which could conceivably be construed as a recommendation against "en banc" hearing as provided by the advisory committee proceeding adopted by the Ninth Circuit (Appendix p. 27).

Presumptively, it would have been drafted earlier --say August 11 or 12, 1992.

The order states that the full court was notified of the panel's unanimous decision to recommend that "en banc" hearing be denied.

Before the excerpts could possibly have been considered?

On August 9 or 10, 1992?

By telephone? By writing?

If by writing, a docket entry would have been made showing distribution. There is none.

The order of August 13, 1992, states that no member of the court requested a vote. How could that be if the full court had received no recommendation until August 13, 1992?

The advisory committee notes (adopted by the Ninth Circuit states (Appendix p. 271)

The Court of Appeals panel apparently decided to act within hours of its decision to recommend denial of the petition as well as recommend denial of the suggestion for en banc hearing. Instead of awaiting the 21-day period,

the panel entered its final order on August 13, 1992.

Usual and customary procedure would be for the three-judge panel to have distributed in writing its recommendation against "en banc" hearing, awaited the 21 days to allow for consideration by the full court, and thereafter entered a final Order if no request was made by a member of the court for "en banc" review.

The precipitous action of the panel apparently was intended to prevent consideration of either petition by the "en banc" court.

Unless corrected, the procedure will be approved by this court.

Later cases decided by the Ninth Circuit have rejected the imposition of sanctions even where an appeal was frivolous but never where an appeal from a favorable trial court decision is taken to a Circuit Court from a District Court

or Bankruptcy Appellate Panel decision which reversed a bankruptcy court's factual determination.

Citations as shown by A.L.R., later case service, 67 A.L.R. Fed. 319-349 (Ninth Circuit) which reject requests for sanctions are:

Kehr v. Smith, Barney, Harris, Upham & Co. (1984, CA 9 Cal.,) 736 F.2d 1283, CCH Fed. Secur. L. Rep. p. 91547, 39 FR. Ser. 2d 924;

Unt v Aerospace Corp. (1985 CA9 Cal.) 765 F.2d 1440, 38 BNA FEP Cas 999, 37 CCH. EPD.P. 35427, 2 FR Serv. 3d 524;

RRX Industries, Inc. v. Lab-Con., Inc. (1985, CA9 Cal. 772 F.2d 543, 41 UCCRS. 1561;

Tomer v. Gates, (1987, CA9 Cal.) 811 F.2d 1240;

Caldwell v. Puget Sound Electrical Apprenticeship & Training Trust, (1987),

CA 9 WAsh.) 824 F.2d 765, 44 BNA. FEP. Cas. 907, 43 CCH. EPD P. 37295;

Hanna Boys Center v. Miller, (1988 CA 9 Cal.) 853 F.2d 682, 129 BNA. LRRM. 2082, 109 CCH. LCP. 10647;

Bulgo v Munoz, (1988, CA9 Hawaii) 853 F.2d 710;

Leidholdt v. L.F.P. Inc., (1988, CA9 Cal.) 860 F.2d 890, 15 Media L.R. 2201, cert den. (US) 103 L.Ed. 2d 837, 109 S. Ct. 1532;

Mackey v. Pioneer Nat. Bank, (1989, CA9 Wash.) 867 F.2d 520, 13 FR. Serv. 3rd 638.

Sheet Metal Workers Int'l Assn. Local No. 162 v. Jason Mfg. Inc., (1990, CA9 Cal.) 900 F.2d 1392, 134 BNA. LARRM. 2097, 115 CCH. LCP. 10003.

In the case of Tomer v. Gates, (1987, CA9, Cal.) 811 F.2d 1240, the court stated:

"Attorneys' failure to withdraw the demand (for sanctions) was unbecoming a member of the Bar of the court."

When an "en banc" hearing of the Rule 60 motions for relief from the judgment of August 26, 1991, was requested, the docket of the Ninth Circuit court discloses that the "en banc" petitions were never circulated to the court as required by the procedures of Fed. R. App. P. 35 (b),and no order denying "en banc" hearing appears to have been entered (See Ninth Circuit Docket, Appendix 169-189.

The only order respecting that petition for Fed. R. Civ. P. 60 relief is the Order denying the petition and directing an additional sanction of $2500.

On August 13, 1992, an order denying the petition for rehearing of the March

24, 1992, order was denied, and a hearing en banc was rejected.

THE CONSTITUTIONAL QUESTION

Closely allied with a motion for relief from a a void judgment or an improper judgment is the question of when, if ever, does such a judgment or sanction constitute an impermissible taking of property without due process of law contrary to constitutional amendment.

Amendment V provides as applicable (Appendix p. 268)

Does Fed. R. App. P. 38 violate Amendment V of the U. S. Constitution?

That Rule is entitled "Damages for Delay," but provides for the award of damages to an "appellee" if an appeal is determined to be frivolous.

The rule does not define "frivolous," but we assume the rule was intended to prevent appeals intended to vex, annoy, harass, or delay an appellee

without any reasonable basis for so doing.

But is there a point where an award of sanctions results in an impermissible "taking" of an attorney or client's property.

If the sanction is lifted or vacated by this court, because not authorized by Fed. R. App. P. 38, the constitutional provisions would not come into play.

If, however, the sanctions against Erwin & Erwin, P. C. are held to be authorized, damages awarded to Brewer who is the appellant in her District Court appeal, but nominal appellee in the appeal to the Ninth Circuit, calls for a determination of the question: "Does such a sanction without hearing constitute a taking of property without due process of law"?

The authority of the appellate court under Fed. R. App. P. 38 by its language

is unlimited in scope and without procedural restraints or guidance (short of the court's general inherent powers)

If the court should look with disfavor at a party or an attorney and awards a devastating sanction under the guise of some procedure which the court states (without any basis in fact) has been undertaken frivolously, has the constitutional provision been violated?

The arbitrary award of damages to the appellee for a frivolous appeal does not constitute the taking of property for a public purpose, (Article V), but the awarding of a sanction with directions to pay the amount to the Clerk of the court may well constitute a public taking. However, the subsequent order of August 10, 1992, omits the direction to make payment to the Clerk of the Court and directs payment to no one.

Such an award, however, is not permitted at all under Fed. R. App. P. 38 because it is not an award of single or double costs or damages, and no other award is permitted under that rule.

To award sanctions without authority would violate the constitutional provision of the Constitution of the United States of America.

The Ninth Circuit therefore has so far departed from the usual and accepted standards of procedure as to invoke the supervisory powers of the Supreme Court.

The remedy here appears to be a direct appeal or petition for certiorai where the action of a Federal Judge or panel is so lacking in substance and authority as to constitute an impermissive taking or a punishment without trial or hearing. If "appeal" was available for redress, it would eliminate the question of due process.

The functioning of the entire Federal Judicial system is jeopardized by the chilling effect upon officers of the court performing necessary services both to the courts and litigants when an unlimited and irresponsible damage award is made without even minimal constitutional protection and without hearing or basis.

QUESTION OF FIRST IMPRESSION

Judge Alarcon in his dissent from the Order of March 24,1992, stated (p. 2859) (Appendix p. 66)

The dissent distinguishes the case of McConnell v. Critchlow, 661 F. 2d 116 (9th Cir. 1981), relied upon by the majority.

This, therefore, is a matter of first impression and adopts a new and novel and highly controversial procedure unintended and unsupported by any authority, devoid of logic, and calling

into play the CONSTITUTION OF THE UNITED STATES OF AMERICA, and the law prohibiting the deprivation of civil rights of lawyers representing clients.

CONCLUSION

This petition's allegations are all based upon matters of record and are therefore uncontrovertible physical facts.

Petitioner therefore requests that the following actions and findings be considered by the court:

1. The order of the March 24, 1992, awarding sanction damages in the amount of $5058.75 is reversed, and the Order is vacated;

2. The orders of July 22, 1992, and August 10, 1992, are reversed and vacated.

3. The petition under Rule 60 Federal Rules of Civil Procedure is allowed. The judgment opinion of August

26, 1991, is arrested, and the opinion is vacated; the mandate is recalled.

4. The order of July 28, 1992, vacating the sanction order of July 22, 1992, is affirmed;

5. The order of August 13, 1992, denying the petition for rehearing of the March 24, 1992, order is moot.

6. The decision of the United States District Court is reversed, and the order of the bankruptcy court is affirmed.

The foregoing action is based upon the following propositions of law:

1. The sanction levied by the Order of March 24, 1992, is not authorized under Rule 38 Federal Rules of Civil Procedure. When the parties are properly realligned, Brewer is an "appellant," and Rule 38 allows damage sanctions only by award to an "appellee."

Without reallignment, the award of damages was improper in any event because

the District Court appeal to the Ninth Circuit was not frivolous as a matter of law but was taken in good faith and was meritorious.

Sanctions are not permissible on the theory that the trial judge's decision allowing the claim of Erwin & Erwin, Professional Corporation was so improper that the District Court's reversal should not have been appealed and was therefore frivolous.

2. The opinion of the court 942 F.2d 1462, is void because the Court of Appeals relied upon only a portion of the bankruptcy court record which was before it, a major portion of which had been excised by the Order of the District Court.

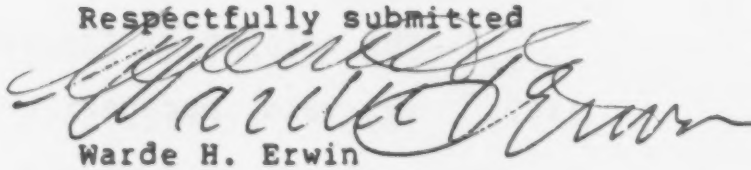
An appellate court reviewing an Order of the bankruptcy court "de novo" must rely on the same record as was presented to the bankruptcy judge.

The motion for relief from a void order under Rule 60 Federal Rules of Civil Procedure was proper and should have been allowed.

The United States District Court order reversing the bankruptcy court was void for failure to follow Bankruptcy Rule 8013 and 11 U.S.C. 502.

The constitutional question is not reached.

Respectfully submitted



Warde H. Erwin

October 10 1992